No. 15670

United States Court of Appeals
For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant,*

vs.

GERALDINE B. GORTER, as Administratrix of the Estate of John M. Waldrep, Deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

KARR, TUTTLE & CAMPBELL,
CARL G. KOCH,
COLEMAN P. HALL,
Attorneys for Appellant.

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I.
STATEMENT DISCLOSING JURISDICTION

The United States District Court for the Western District of Washington, Northern Division, the trial court, had jurisdiction of this cause by virtue of authority granted by the Congress of the United States in Ch. 646, 62 Stat. 930; 28 USCA, Sec. 1332. The complaint of appellee (R. 3-9) and the answer of appellant (R. 26-36), as amended (R. 45-47), disclose appellant to be a corporation organized under the laws of and a citizen of the State of Minnesota, appellee to be a citizen of the State of Washington, and the matter in controversy to exceed the sum of $3,000 exclusive of interest and costs.

This appeal is from a final judgment (R. 92) entered in the United States District Court for the Western

District of Washington, Northern Division, in the amount of $40,000 plus costs. This court has jurisdiction to review such judgment by virtue of Ch. 655, 65 Stat. 726; 28 USCA, Sec. 1291.

II.

STATEMENT OF THE CASE

Appellant, Northwest Airlines, Inc., is a Minnesota corporation engaged in the business of transporting cargo and passengers by air. On or about September 23, 1950, appellant entered into a contract with the United States Air Force whereby appellant agreed to transport between Japan and the United States such military personnel as the United States Government should from time to time designate (Pl. Ex. 9). Pursuant to such designation (Def. Ex. A-21) flight 324, a Douglas DC-4 type airplane, was dispatched by appellant January 17, 1952, from Tokyo, Japan, to McChord Field, Tacoma, Washington, with stops in Shemya in the Aleutian Islands and Anchorage, Alaska. John M. Waldrep, a sergeant in the United States Army, was assigned to, and was aboard said flight. The evening of January 18, 1952, flight 324 departed from Anchorage. At about 7:00 p.m. Anchorage time (R. 507) it became necessary to stop one of the airplane's four engines and to feather its propeller. The flight thereafter continued uneventfully on three engines. At approximately 1:30 a.m. January 19, 1952, a precautionary landing was attempted at Sandspit air field on the northeast tip of Moresby Island, one of the Queen Charlotte Islands, in the Province of British Columbia, Dominion of Canada. The runway at Sandspit is 5,150 feet in length and lies generally in a north and south direction (R. 747-9).

It was covered with a thin layer of snow (R. 746, 954) and snow banks lined the runway on either side (R. 746, 955). Oil flare pots placed along the snow banks were used to illuminate the runway (R. 954).

The airplane, still on three engines, landed approximately ⅓ of the way down the runway (R. 954), and almost immediately full power was reapplied to the three engines in an apparent attempt to take off again (R. 145). The airplane became airborne, barely clearing a fence at the end of the runway (R. 747, 955). The plane failed to climb or maintain flying speed and settled into the adjacent waters of Hecate Strait. The cabin began to fill immediately with water and the airplane, still substantially intact, came to rest in the shallow water (R. 1125-6). The rudder fin and a portion of the left wing remained above water (R. 1126).

Sgt. Waldrep did not survive the accident. At the time of his death Sgt. Waldrep was a resident of the State of Alabama. On January 18, 1954, Geraldine B. Gorter, a Washington resident, was appointed special administratrix of the estate of John M. Waldrep by the Superior Court of the State of Washington. On the same day, the administratrix commenced this action on behalf of Sgt. Waldrep's only child, Judith Ann Waldrep, born January 22, 1952.

Appellee's complaint designates three separate counts for recovery of damages for the death of Sgt. Waldrep. Count one is based upon the State of Washington's wrongful death act, Revised Code of Washington 4.20.010, which is pleaded therein. Count two is based upon the Convention for the Unification of Certain Rules Relating to International Transportation by

Air, 49 Stat. 3000, popularly referred to as the Warsaw Convention. Count three is based upon the contract above referred to between appellant and the United States Air Force.

In her complaint appellee alleged that the accident happened in British Columbia. In its amended answer appellant admitted that the accident happened in British Columbia and denied the applicability of the Washington wrongful death act, the Warsaw Convention, and denied any liability under the Air Force contract. Further, paragraph IX and affirmative defense XII of the amended answer allege that the Families' Compensation Act of British Columbia, Canada, Ch. 116, British Columbia Revised Statutes, 1948 (Def. Ex. A-42) is applicable and that the one year statute of limitations contained therein is a bar to the maintenance of this action by appellee.

The cause was tried to the court, and the court found that appellant was negligent in various respects. In addition, notwithstanding contrary allegations in the complaint which were admitted in the answer, the trial court held that the accident did not occur in British Columbia; that therefore the Families' Compensation Act did not apply; that although the accident occurred in Canadian waters, plaintiff was entitled to recovery based upon the Washington wrongful death statute. The court then entered judgment against appellant in the amount of $40,000 plus costs. No recovery was granted under counts two or three. Appellant's motion for new trial, as well as its motions to amend its answer and to reopen the cause for further testimony as to the law applicable at the place where the court found the

accident occurred, were denied, and this appeal followed. This appeal involves the following questions:

1. Did the airplane accident occur within the territorial boundaries of British Columbia, Canada, so that the British Columbia Families' Compensation Act applies?

2. Is appellee bound by the allegation of her complaint that the accident occurred in British Columbia, which allegation was admitted by appellant in its answer?

3. Are the parties bound by the prior adjudication of the Supreme Court of Washington that the accident occurred in British Columbia?

4. Is this action barred by the Statute of Limitations contained in the British Columbia Families' Compensation Act?

5. Does the Washington wrongful death act have any extraterritorial application to an accident occurring outside the territorial boundaries of the State of Washington?

6. Can it be presumed that a statute creating a cause of action for wrongful death has been enacted in a foreign country? If so, can it be further presumed that the foreign statute is identical with the wrongful death statute enacted by the legislature of the State of Washington?

7. Is this a proper case for the application of a presumption as to the foreign law?

8. Should appellant's witness, John Bird, have been prevented from testifying that there was no Canadian

law applicable, other than the British Columbia Families' Compensation Act, which afforded a remedy for wrongful death?

9. Should appellee's witness, John Cunningham, have been permitted to answer a hypothetical question as to the applicability of the British Columbia Families' Compensation Act when the question did not state whether or not the accident occurred in British Columbia?

10. Were the findings of fact upon which the damage award was based supported by the evidence?

11. Was the damage award excessive?

12. Should the court have permitted appellant to amend its answer to plead the law applicable at the place where the court found that the accident occurred, and have permitted the case to be reopened for further testimony as to that law?

13. Should the cost of producing unnecessary portions of the transcript and printed record be taxed to appellee?

These questions are raised by the pleadings, by appropriate and timely objections during the trial, offers of proof, appellant's motions to reopen and to amend, appellant's statement of points on which appellant intends to rely (R. 114), and by the following specifications of error.

III.

SPECIFICATION OF ERRORS

1. Error of the district court in making the following portion of Finding of Fact No. 2 (R. 83), which the evidence before the court does not support:

> "That the decedent, John M. Waldrep, an American citizen, died on the 19th day of January, 1952, in the crash of an airplane operated by defendant at a point in salt water more than a half mile out seaward from low water mark and off shore of Sandspit, British Columbia, Dominion of Canada."

The district court should have found that the crash was at a point in salt water landward from ordinary low water mark in British Columbia, Canada.

2. Error of the district court in making Finding of Fact No. 8 (R. 87), which the evidence before the court does not support.

The district court should have found from the evidence that the pertinent sections of the British Columbia Families' Compensation Act were pleaded and proved and that said Act was the only law affording a cause of action for wrongful death of an airplane passenger resulting from the crash of an airplane into the water in British Columbia, Canada; that said Act was applicable and in full force and effect at the time and place where decedent Waldrep died; that the one year limitation of action provided for in Section 5 of said Act is a bar to plaintiff's cause of action; that defendant has sustained by a preponderance of the evidence its 12th affirmative defense; that the wrongful death statute of the State of Washington has no application

and does not control or govern the rights of the parties in this cause.

3. Error of the district court in making the following portion of Finding of Fact No. 9 (R. 88), which the evidence before the court does not support:

> "9. That the defendant has failed to sustain by preponderance of evidence in this case, facts necessary to support the allegations of their other affirmative defenses as to Count I of the plaintiff's complaint. But on the contrary, the court finds that:
>
> * * * * * *
>
> "e. That defendant failed to prove by the preponderance of the evidence any law other than the Wrongful Death Act of the State of Washington which would be applicable to this cause of action."

The trial court should have found that defendant sustained by a preponderance of evidence facts necessary to support the allegations of its 12th affirmative defense based upon the one year statute of limitations contained in Section 5 of the British Columbia Families' Compensation Act pleaded by defendant; that defendant pleaded and proved the pertinent provisions of said Act and has proved that said Act is the only law applicable to the facts of this case; that the Washington wrongful death act was not applicable.

4. Error of the district court in making Finding of Fact No. 10 (R. 88), which the evidence before the court does not support.

The district court should have found that the deceased Waldrep completed the tenth grade in school only, was unskilled, and from age sixteen spent nearly

all of his time in military service. That at the time of his death he was a buck sergeant, pay grade "E-4," in the United States Army. That it could be reasonably expected that the deceased Waldrep would support his dependents only to the extent that his means permitted. That Judith Ann Waldrep is a five-year-old girl, normal physically and mentally.

5. Error of the district court in making Finding of Fact No. 12 (R. 90), which the evidence before the court does not support. The damage award was excessive.

6. Error of the district court in making Conclusion of Law No. 4 (R. 90), which the evidence and facts do not support.

The district court should have concluded that the wrongful death act of the State of Washington was not applicable under the facts as found by the court or as claimed by the appellant. That thereunder appellee cannot maintain an action to recover damages for the death of Waldrep.

7. Error of the district court in making Conclusion of Law No. 5 (R. 90), which the evidence and facts do not support.

The district court should have concluded that appellee is not entitled to recover under the laws of the State of Washington.

8. Error of the district court in making Conclusion of Law No. 6 (R. 91), which the evidence and facts do not support.

The district court should have concluded that appellee was not entitled to judgment in any sum.

9. Error of the district court in entering judgment for appellee and against appellant under Count I of the complaint (R. 92).

The district court should have entered judgment dismissing appellee's complaint with prejudice and should have awarded appellant its taxable costs.

10. Error of the district court in denying appellant's motions to amend its answer, to reopen for further testimony, and for new trial. These motions were made so that appellant could plead and offer proof of the applicable law existing at the place where the court found the accident to have happened. The court should have granted said motions because the court's finding placed the accident in a jurisdiction different from that agreed upon by the parties in the pleadings, and settled in a prior adjudication of a case involving the same accident and the same parties, thus requiring the application of different laws.

11. Error of the district court in prohibiting witness, John I. Bird, from answering the following questions:

(a) Mr. Koch: "Would that jurisdiction be exclusive?" (Jurisdiction of the British Columbia Supreme Court to hear and decide litigation arising out of this accident.) (R. 1029).

Appellee objected:

Mr. Riley: "Yes, I do (object), Your Honor." (R. 1029).

(b) Mr. Koch: "What have you to say with respect to the exclusive aspects of such jurisdiction?" (R. 1029).

Appellee objected:

Mr. Riley: "Counsel intends to, and is about to

go outside the scope of his pleadings and his amended pleadings . . .'' (R. 1029).

If admitted, the answers to questions (a) and (b) would have been that such jurisdiction was exclusive (R. 1040).

(c) Mr. Koch: ''If the British Columbia court had before it a wrongful death action stemming from the accident, what law would the court apply?'' (R. 1030).

Appellee objected:

Mr. Riley: ''I want to object. The question is outside the scope of the pleadings. I believe he can ask 'could it have applied?' He cannot ask him whether it would have.'' (R. 1030).

If admitted, the evidence would have been that the British Columbia court would have applied the Families' Compensation Act (R. 1031-2).

(d) Mr. Koch: ''If you know, will you state what the British North American Act is?'' (R. 1037).

Appellee objected:

Mr. Riley: ''If the court please, as to that question I would like to state that there is no reference to any other statute within the scope of these pleadings, and the question is irrelevant. It is completely outside the scope of defendant's allegations as to the applicable law or what law could have been applied.'' (R. 1037).

(e) Mr. Koch: ''What government, if you know, has the exclusive authority to deal with regard to property and civil rights?'' (R. 1038).

Appellee objected:

Mr. Riley: "I don't like the terminology 'exclusive,' and I am afraid what counsel is leading to; he wants something in the records that deals with the exclusive nature of this." (R. 1038).

(f) Mr. Koch: "What have you to say as to whether the Families' Compensation Act deals with matters affecting property and civil rights?" (R. 1038).

Appellee objected:

Mr. Riley: "I object, Your Honor. It is calling for a conclusion, and it is a leading question." (R. 1038).

The answers to questions (d), (e), and (f) would have shown that, as far as the Canadian lawmaking power is concerned, only the legislature of British Columbia could enact and deal in the field of property and civil rights, and that no other legislature or other courts in a different jurisdiction of Canada could have any function in that respect (R. 1038). Further, they would have shown that there was no wrongful death act under which appellant could claim even if the accident did not happen in British Columbia.

12. Error of the district court in permitting appellee's witness, John Cunningham, to answer the following hypothetical questions propounded by appellee:

(a) Mr. Riley: "I will ask you to assume that in January, 1952, a United States airplane operated by a United States corporation, Northwest Orient Airlines, Inc., pursuant to a contract with the United States Government, Department of the Air Force, left Japan with passengers for the United States, and after leaving Anchorage, Alaska, attempted to make an emergency landing at the

airstrip at Sandspit, British Columbia, but instead crashed into open water at a point approximately one-half to three-quarters of a mile from shore; and ask you to assume further that one of the passengers, a United States citizen, died, leaving surviving a wife and infant child; and assume further that the said death was caused by the wrongful act or acts of the carrier, Northwest Airlines, Inc.; and assume further that the administratrix of the deceased's estate brought an action for and on behalf of the said child; do you have an opinion as to whether or not Sections 3 and 5 of the Families' Compensation Act of British Columbia would apply to this state of facts?" (R. 1061).

MR. CUNNINGHAM: "I have." (R. 1061).

MR. RILEY: "What is that opinion?" (R. 1061).

Appellant objected:

MR. KOCH: "Your Honor, I must object to this testimony. If the court will refer to the pleadings in this case, it will observe in the *Gorter* case that it is alleged that this airplane crashed in British Columbia. It is admitted by the defendant's answer that the airplane crashed in British Columbia, and that it is a fact that is not in issue at this time. Therefore, if the witness is going to testify that any law other than the law of the province of British Columbia applies here, it is entirely inadmissible, Your Honor." (R. 1062).

"... I believe, in order for the hypothetical question to remain within the pleadings it must state: 'assuming that the accident happened in British Columbia, in Hecate Strait in British Columbia'." (R. 1063).

MR. CUNNINGHAM: "My opinion is that said Act would not be applicable." (R. 1065).

(b) MR. RILEY: "And would you state why you have so concluded?" (R. 1065).

Appellant objected:

MR. KOCH: "Just a moment, please. Now, again I must object, Your Honor, because it would appear that there is now an attempt to establish the applicability, perhaps, at least as far as I can tell from the question, of some other law, and, if so, that is certainly not in rebuttal to the proof in support of the affirmative defense."

MR. CUNNINGHAM: "The Families' Compensation Act of British Columbia has no extraterritorial operation, and the territorial jurisdiction of Canada and the right of the province ends at low water mark, at low water, and under the stated facts and in view of that fact, that is one reason.

"The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States. Also—"

MR. KOCH: "I don't think this is responsive." (1078).

IV.

SUMMARY OF ARGUMENT

A. The Accident Happened in the Province of British Columbia, as Established by:

1. The pleadings.
2. The evidence.
3. A prior adjudication involving the same accident and parties.

B. The Law of the Place of the Tort Controls.

C. Appellee's Action Is Barred by the Statute of Limitations in the British Columbia Wrongful Death Act.

D. The Washington Wrongful Death Act Is Not Basis for Recovery.

1. The law of the place of the tort controls.
2. The accident and injury causing death took place either in the waters of the Province of British Columbia or in the adjacent waters of the Dominion of Canada.
3. The Washington statute does not have extraterritorial effect.

E. Appellee Failed to Plead or Prove the Foreign Law.

F. A Presumption as to Foreign Law Is Not Basis for Recovery.

1. Appellee has never relied on any foreign law.
2. Appellee is estopped from relying on any foreign law or presumption.
3. Appellant proved the foreign law (British Columbia).

4. Appellant's additional proof of foreign law was erroneously excluded.
5. The court erroneously applied the wrong foreign law presumption.

G. The Damage Award Was Excessive.

H. The Cost of Producing Unessential Portions of Record Should Be Taxed Against Appellee.

V.
ARGUMENT

A. THE ACCIDENT HAPPENED IN THE PROVINCE OF BRITISH COLUMBIA

The most critical error committed by the district court was in finding that the accident occurred "at a point in salt water more than a half-mile out seaward from low water mark and off shore of Sandspit, British Columbia, Dominion of Canada" (R. 83). This basic error laid the foundation for the erroneous findings that the law of British Columbia does not apply (R. 87), that the action is not barred by the limitation provisions contained in the British Columbia wrongful death statute (R. 87), that no applicable law was pleaded and proved by appellant (R. 87), and that the wrongful death statute of Washington should, therefore, be applied (R. 88). It is important that this finding of fact be meticulously examined. It is appellant's position that the pleadings preclude such a finding, that the finding was totally unsupported by any evidence and was contrary to all the evidence in the case bearing on this issue, and that the parties are bound by a prior adjudication to the contrary.

1. The Pleadings

The pleadings conclusively establish that the accident happened in the Province of British Columbia, Canada. In paragraph VI of appellee's complaint it is alleged that the accident happened "less than a mile offshore in the waters of Hecate Strait, British Columbia" (R. 5). This allegation was admitted by appellant in paragraph VI of its answer (R. 28). From then on where the accident happened and where Sgt. Waldrep died were no longer facts in issue. It became the agreed and uncontested fact of the case that the accident and death occurred in British Columbia. In exact conformity with this allegation it was the appellee's consistent position prior to and during the trial that the accident happened in British Columbia. Appellee made the following requests for admissions of facts:

> "5. That the above-named decedent, J. M. Waldrep, was a passenger aboard Flight No. 324 . . . when the said aircraft crashed at Sandspit, British Columbia . . ." (R. 37).
>
> "7. That the said decedent, J. M. Waldrep, died in the wreckage of . . . said aircraft . . . at Sandspit, British Columbia." (R. 38).

Again, in the pre-trial order, approved by counsel for both parties (R. 51), the accident is referred to as "the crash of Northwest Airlines Flight 324 at Sandspit, B. C., on January 19, 1952." And in a memorandum prepared by appellee (R. 18), appellee again recognized that the accident happened in British Columbia. There she stated that the crash occurred "in a foreign country" (R. 18) and that decedent died in Canada (R. 19). In that memorandum the appellee argued that the

Washington wrongful death statute should be applied even though the accident and death occurred in British Columbia. Even during the trial appellee's counsel several times stated that the airplane crashed at Sandspit, British Columbia (R. 542, 608), and no attempt to prove otherwise was made by appellee.

Appellee having taken the position that the accident and death occurred in British Columbia in her complaint, in her request for admissions of facts, in the pretrial order, and in her memorandum of authorities, appellant amended its answer and affirmative defense by pleading the British Columbia Families' Compensation Act, alleging that it was the applicable law, and asserting the bar of its limitation provision. The issues were thus clearly drawn. The only question raised by the affirmative defense was whether appellee's action was barred by the one year limitation provision of the British Columbia Act, not whether the accident happened within or without the territory of British Columbia.

Nevertheless, the district court at the conclusion of the trial found that the accident did not happen in British Columbia and therefore that the British Columbia law was not applicable. This finding was directly contradictory to the allegations of appellee's complaint, which were admitted by appellant, and to the position taken by appellee in her request for admission of fact, in the pre-trial order, in her memorandum of authorities, and at the trial. Such finding was inconsistent with the theory upon which the case was submitted, and there was not a scintilla of evidence from which to make such a finding. This finding was inappropriate, erroneous, and extremely prejudicial.

2. The Evidence

Implicit in the court's finding is the assumption that British Columbia law has no effect seaward of low water. However, it is not all clear that low water mark defines the outer boundary of the Province of British Columbia. It is undisputed, however, that such boundary extends *at least* to low water mark. This was the testimony of both Mr. Bird and Mr. Cunningham, the British Columbia attorneys who testified at the trial as to the British Columbia law (R. 1042, 1066). Mr. Bird went on to state that the ownership of the area between low water mark and the three mile limit has never been judicially determined but that the governments of both British Columbia and the Dominion of Canada have enacted legislation on other subjects governing that area (R. 1042). Mr. Cunningham, called by appellee in rebuttal, did not deny this, but merely concluded without citation of any authorities that British Columbia territory ends at low water mark (R. 1066). As British Columbia has exercised governmental powers beyond low water mark, it is unreasonable to assume, as the district court has done, that the Families' Compensation Act is not also effective in that area, particularly in view of a recent and leading case which was cited to the district court holding to the contrary. *LeVal v. S.S. Giovanni Amendola,* 17 WWR 144 (R. 61).

The court's finding that the accident happened seaward from low water mark, and therefore outside British Columbia, is totally unsupported by any evidence. In fact, all of the evidence is directly to the contrary and would abundantly support a finding that the accident happened *landward* of low water mark.

Before discussing the evidence, the difference between low water mark and low tide should be made clear. Mr. Joseph M. Kildahl, a maritime navigation expert, explained that there are too low tides each day and that they vary in height from tide to tide. Low water mark on the other hand does not vary from tide to tide but is a fixed point representing an average of low tides taken over a period of 19 years (R. 1049, 1058). Mr. Kildahl then stated that during the year there would be low tides both higher and lower than low water mark (R. 1050).

During appellee's case in chief, no evidence was introduced from which it could be found that the accident happened seaward of low water mark. The only evidence presented during appellee's case in chief that even touched on the location of the accident was photographs of the wreckage 6 months after the accident, and irrelevant statements of Hufford Maynard, Donald Baker, and Dudley Cox, made while being examined as to other matters.

Mr. Maynard, a survivor and plaintiff in a case consolidated with this case for trial, testified that while waiting on the airplane to be rescued, he saw automobile headlights and house lights, although he could not see the actual shore (R. 147). He stated further that after takeoff from Sandspit, the crash of the airplane into the water was "practically instantaneous" (R. 188).

Mr. Baker, another survivor, testified by deposition that he could see land and the airport lights from the crashed airplane (R. 1132).

Mr. Cox, a member of appellant's accident investiga-

tion team, stated that in January, after the crash, an attempt was made to walk out to the wreckage at night at low tide (R. 636), but just short of reaching the airplane, they were forced to turn back because of the fog that came in and enveloped the area (R. 928).

The only other evidence offered by appellee was a series of pictures of the wreckage taken in June, 1952 (Pl. Ex. 29). Even though these pictures were taken while the tide was coming in (R. 1009), they show the remains of the airplane to be almost completely out of water.

No other evidence was offered by appellee which referred at all to the location of the airplane. The evidence offered does not show nor bear on the location of the airplane *with reference to the low water mark.*

During the presentation of appellee's case, other incidental references to location were made. Mr. Richard Fields, another survivor testifying by deposition, stated that the airplane was close to a mile from shore (R. 1161). Mr. Cox volunteered the information that the accident occurred half a mile off shore (R. 699). Mr. Sanders, another member of the investigation team, stated that his recollection was that the airplane was in the vicinity of half a mile from shore. He stated that he did not see the wreckage at low tide because in January, 1952, the only time he was there, the lowest tide was at about 1:00 o'clock in the morning. One attempt to walk out to the plane at the morning low tide was almost successful. Fog came in, however, and they were forced to turn back. He also stated that at low tide a boat was not practical because there was no water except for puddles (R. 928) in the runoff area, which was rocky

and studded with boulders (R. 855). Although he did not observe the wreckage at the early morning low tide (R. 927), he did observe the top of the fuselage out of water during the day (R. 928, 929).

None of the foregoing testimony bears on the crucial question of where the crash occurred in relation to low water mark. It is only the location of the wreckage with reference to low water mark that is important. The distance of the wreckage from shore is immaterial; neither is the location of the wreckage at a particular low tide material unless the low tide is in turn related to low water mark. Nowhere has appellee attempted to do this.

To prove its affirmative defense based on the British Columbia law, appellant offered proof to corroborate the admitted fact that the accident happened in British Columbia, landward of low water mark. The testimony of Mr. Donald Leonard was introduced. Mr. Leonard was regional safety engineering chairman for the Air-line Pilots' Association and as such was part of the team that investigated the accident in January, 1952, and again in June, 1952. He was the only witness testifying at the trial who actually climbed aboard the wreckage of the aircraft. In fact, Mr. Leonard went aboard on several occasions in June, 1952 (R. 996). On these occasions he walked out to the airplane, and the entire airplane was out of water. He testified that when he walked out to the plane on June 9, 1952, the remains of the airplane were completely out of water except for a section of the top that had become detached (R. 996). This top section was lying in a pool in the runoff area (R. 996, 997), which was rough, dotted by boulders as

high as a two-story house, and pitted with large holes (R. 994). He testified in part as follows (R. 996, 997):

MR. KARR: "Where the plane was situated when you returned in June, was it sitting on top of the sand, or was it buried to some extent?"

MR. LEONARD: "The inboard engine nacelles were buried to the bottom skin of the wing, and the bottom of the airplane was disintegrated and gone. Otherwise, the bottom surface of the wing was resting on the top of sand and rocks."

MR. KARR: "To what extent were the nacelles buried?"

MR. LEONARD: "Approximately 18 inches, the tip of the nacelles."

MR. KARR: "Were you out to the plane when you were at Sandspit in June, 1952?"

MR. LEONARD: "I was."

MR. KARR: "On more than one occasion?"

MR. LEONARD: Yes."

MR. KARR: "How did you get out to the plane?"

MR. LEONARD: "We walked out to it."

MR. KARR: "You mean it was out of the water?"

MR. LEONARD: "Yes, sir."

THE COURT: "When did you do this?"

THE WITNESS: "The morning of June 9th."

MR. KARR: "Was the entire plane out of water at that time?"

MR. LEONARD: "What was remaining of the airplane was out of water. There was a large puddle of water roughly fifty feet in diameter (999), and I imagine, two, or two and a half feet deep. There were large depressions in this run-off area there

from the cockpit area, and the top section of the airplane was lying in this pool."

MR. KARR: "I mean so far as the edge of the water is concerned, the tidal edge, was that beyond the plane or where?"

MR. LEONARD: "Yes, sir. The tidal edge, as best we could ascertain, would be about 75 feet from the center of the airplane."

Salvage attempts were made to recover the airplane shortly after the accident in January, 1952 (R. 854, 993). Mr. Leonard, who was present at that time, testified that a fishing boat was hooked onto the airplane and an attempt to tow it made (R. 993). The towing was attempted in three different directions without success. In all, the airplane was not moved more than 100 feet total in all three directions (R. 994). In answer to a question of whether after salvage was abandoned the airplane was closer or farther away from shore, Mr. Leonard testified that it was approximately the same and that any movement was at best only parallel to the closest shore and not closer to shore (R. 994). When Mr. Leonard returned in June, 1952, the inboard engine nacelles of the airplane were substantially buried in sand (R. 996). He testified that the airplane appeared to be in exactly the same location and position as it was in January, 1952, when he left (R. 995).

To relate this testimony to low water mark, appellant introduced the testimony of Joseph W. Kildahl, a maritime navigation instructor holding a license as master of ocean, steam, and motor vessels, who was qualified as an expert witness. Mr. Kildahl testified that he was familiar with the Queen Charlotte Islands and the sea-

coast in the vicinity of Sandspit, British Columbia (R. 1047). He explained that low water mark has been determined by observing the low tides over a nineteen-year period (R. 1049, 1058). Low water mark is a fixed point and represents the average position of low tides throughout the period (R. 1049, 1058). He then stated that low water mark is designated zero and all tides are measured in terms of feet above or below that point (R. 1049, 1050).

Referring to tide tables for North and South America prepared and issued by the United States Coast and Geodetic Survey, a branch of the United States Department of Commerce (Def. Ex. A-43), Mr. Kildahl gave the heights of the tides at Sandspit, British Columbia on January 19, 1952, at the time of the accident, and on June 9, 1952, when Mr. Leonard walked out to the wreckage (R. 1057). At the time of the accident, the height of the tide was 12 feet and was rising at the rate of two feet per hour (R. 1057). This coincides exactly with the testimony of the survivors, Maynard and Baker, who testified that the tide was coming in and water gradually covered the plane (R. 149, 1126). Mr. Kildahl testified that on June 9 the height of the water at low tide was 1.1 feet above the height of the water at zero, low water mark. This was the date that Mr. Leonard walked out to the airplane and found it to be completely out of water. Mr. Kildahl then stated that there were other tides during the year 1952 both higher and lower than the low tide of June 9, 1952 (R. 1058).

There is no other testimony in the record with reference to low water mark. Mr. Leonard's testimony that the airplane was out of water at low tide on June 9,

1952, and Mr. Kildahl's testimony that low water mark was seaward of low tide on that day are conclusive. This testimony is highly credible and accurate. Mr. Leonard, an acknowledged aviation accident investigation expert, was the only witness who actually boarded the airplane after the accident. Mr. Kildahl, a maritime navigation expert, was the only witness testifying as to the heights of the tides with reference to low water mark.

3. Prior Adjudication

The district court was required to find that the accident did happen in British Columbia because this issue was previously adjudicated and is *res judicata*. Appellee was appointed administratrix by the Superior Court of Washington in a proceeding contested by appellant by a petition to revoke the letters of administration which had issued. The superior court found that the accident happened in British Columbia and rendered its decision in favor of appellee based partially on that fact. That decision was appealed to the Supreme Court of Washington by appellant and was affirmed. That case was *Northwest Airlines, Inc. v. Geraldine B. Gorter,* as administratix of the estate of John W. Waldrep, deceased, 49 Wn.2d 711, 306 P.2d 213. In three separate places in that opinion, the supreme court held that the accident happened in British Columbia:

> "The deceased (Waldrep) met his death in a Northwest Airlines plane which crashed in British Columbia." (p. 712).
>
> "The deceased (Waldrep) met his death in a crash of the Northwest Airlines plane in the Province of British Columbia, Canada." (p. 712).

> "In the case at bar . . . 3. The accident causing the death happened in British Columbia, Canada." (p. 714).

The authorities unanimously agree that the parties are bound by facts determined in a prior action between the same parties. The rule is well stated in 30 Am. Jur. 920:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief."

Where the accident happened was a fact material to the state court decision and was one of the principal grounds advanced by that court in distinguishing a leading case in Washington upon which appellant had relied. Appellant and appellee were the only parties to the state court case and were represented in the Supreme Court of Washington by the same counsel as here. The same airplane, the same accident, and the same decedent were involved. The state court opinion even referred specifically to appellee's complaint in this case.

It was determined in the state court case that the accident happened in the Province of British Columbia. That determination was *res judicata,* and the district court erred in finding that the accident did not happen there.

B. THE LAW OF THE PLACE OF THE TORT CONTROLS

It is a well settled principle of conflicts of law that the law of the situs of the tort governs the liability therefor. Where the various elements which make up the tort have their situs in different states, a choice must be made of one element, the situs of which will furnish the governing law. In this case negligence is alleged to have occurred in the States of Washington, in British Columbia, and elsewhere. Injury and death occurred in British Columbia. *The rule is settled by an almost unbroken line of authority* that where the choice is to be made between the law of the place where the negligent act or omission originated and the law of the place where the injury or death was inflicted, *the place where the injury or death was inflicted and not the place where the negligent act or omission originated is the place of the tort,* and its law governs liability and other substantive questions. Anno. 133 ALR 260, 261; *Rundell v. La Compagnie Generale Transatlantique* (1900; CCA 7th) 100 Fed. 655; *Hunter v. Derby Foods, Inc.* (1940; CCA 7th) 110 F.2d 970; *Vancouver S.S. Co. v. Rice* (1933) 288 U. S. 445, 77 L.Ed. 885, 53 S.Ct. 420; Stumberg, *Conflicts of Law,* 1937 Ed., pp. 163 to 168, and cases there cited; *Restatement, Conflicts of Law,* Section 377.

This universal rule has been applied without exception to the air cases. *Supine v. Air France* (1951) 100 F. Supp. 214, was a suit by an executrix in New York for wrongful death occurring in an air accident in the Azores; *Maynard v. Eastern Airlines* (1949 CCA 2nd) 178 F.2d 139, was a suit by a New Jersey administratrix for wrongful death in an airplane crash occurring in Connecticut; *Kendall and Sebo v. United Airlines, Inc. and Douglas Aircraft Co.* (1952 CCA 2d) 200 F.2d 269, was a wrongful death action arising out of an airplane accident in Pennsylvania; *Faron v. Eastern Airlines,* 84 N.Y. Supp.2d 568, was an action for wrongful death occurring when the airplane caught fire in New York and crashed in Connecticut. In each case, and in many others which could be cited, the court of the forum applied the law of the place of injury.

The rule that the law of the place of injury shall be applied by the court of the forum has been adopted in the State of Washington. *St. Germain v. Potlatch Lumber Co.* (1913) 76 Wash. 102, 135 Pac. 804, involved a suit to recover for the wrongful death of decedent in Idaho. The Washington court construed and applied the Idaho wrongful death statute and allowed a recovery. *Richardson v. Pacific Power & Light Co.,* 11 Wn. 2d 288, 118 P.2d 985, was an action by plaintiff as administratrix to recover damages for the wrongful death of her husband which occurred in Oregon. Decedent lived in Washington and worked out of the Walla Walla office of the power company. The court in affirming plaintiff's recovery under the Oregon wrongful death statute held that the existence and nature of a cause of action for tort are governed by the law of the

place where the wrong was committed, and that this rule applies to actions for wrongful death.

The Washington rule has been applied consistently by federal courts sitting in this jurisdiction. In *Martin v. Kennecott Copper Corp.*, 252 Fed. 207. Judge Neterer held that the plaintiff's right of recovery is statutory and the limitations of the parties are fixed by the Alaskan act. In *Northern Pacific Ry. Co. v. Adams,* 192 U.S. 440, 48 L.Ed. 513, the court stated that where suit is brought in the State of Washington to recover for a wrongful death occurring in Idaho, that the court of the forum shall apply the Idaho law. Plaintiff's right of action was held to rest on the statute of the State of Idaho, although the decision of the lower court was reversed on another point.

The most recent decision on the point of a federal court sitting in the State of Washington is *Jeffrey v. Whitworth College,* 128 F. Supp. 219. Suit was brought by plaintiff to recover for personal injuries sustained in an accident occurring in Idaho and caused by negligence which took place in Washington. In holding that it is immaterial that negligence occurred in Washington in view of the fact that it did not result in physical injury of the plaintiff in that state, Judge Driver stated in his opinion:

> "It seems clear that in the instant case the wrong was committed in Idaho, even assuming, as I do, that within the State of Washington defendant received information and knowledge that toboggans could not safely be used at the Signal Point Ski Resort and that, in Washington, it failed to discharge its positive duty to warn plaintiff of the danger. No negligent act or omission in Washing-

> ton resulted in any physical injury of the plaintiff in that state. Where the act or omission complained of occurs in one place and the injury is inflicted in another, the place of wrong or *locus delicti* is the place where the injury was sustained; or, as it has sometimes been stated, the place of wrong is in the state where the last event necessary to make an actor liable for the alleged tort occurs."

This is the rule adopted by the British Columbia courts, too. Mr. John Bird, a British Columbia lawyer, testified that if this case had been brought in the British Columbia court, the law of the place where the injury took place would be applied by that court (R. 1075). However, at the trial appellee attempted to show that even if the accident happened in British Columbia, the courts of that jurisdiction would not apply the Families' Compensation Act to this case. The district court did not make a finding on this point. Nevertheless, appellee's unique contention should be discussed. John Bird, a British Columbia lawyer, testified that the British Columbia court, if it had before it a wrongful death action stemming from this accident, could apply (R. 1030) and would apply (R. 1031) the Families' Compensation Act. On the other hand, John Cunningham, a British Columbia lawyer called by appellee, testified upon direct examination that in his opinion the Families' Compensation Act would not be applicable, even if the accident happened in British Columbia (R. 1066). This conclusion was based upon his view that under British Columbia law the tort is deemed committed where the wrongful act takes place and not necessarily where the injury takes place (R. 1066). It was his opinion that the British Columbia court "would

apply the law of the United States" (R. 1066). On cross-examination, however, it is significant that Mr. Cunningham was unable to cite a single British Columbia or Canadian case or statute supporting his contention that the situs of the tort is where the wrongful act is committed rather than where the injury is inflicted. A portion of the examination follows (R. 1068-1069):

MR. KOCH: "If I understood your statement near the end of your direct examination, you stated that the tort is where the wrongful act takes place?"

MR. CUNNINGHAM: "That is my opinion, and that is the law."

THE COURT: "Is that your opinion under the provisions of the Canadian law?"

MR. CUNNINGHAM: "Canadian law applying English law."

MR. KOCH: "What Canadian authorities support that view?"

MR. CUNNINGHAM: "There is a case, *George Monroe, Ltd., v. American Cyanamid Corporation, Ltd.*, 1944, I King's Bench 432, which has been approved in a conflict of law text, and the case itself has been referred to in British Columbia courts."

MR. KOCH: "Is that a British Columbia decision?"

MR. CUNNINGHAM: "That is a decision of the Court of Appeals in England, I believe."

MR. KOCH: "Is that decision binding on the British Columbia courts?"

MR. CUNNINGHAM: "It is not necessarily binding, but it is my opinion it would be followed by the British Columbia courts."

MR. KOCH: "We are only concerned with what

the controlling authority is in British Columbia. Is there any British Columbia case on that subject so holding?"

MR. CUNNINGHAM: "The *American Cyanamid* case has been quoted and referred to in a British Columbia case."

MR. KOCH: "Is there any decision holding that the tort is where the wrongful act takes place, decided by a court of last appeal in British Columbia?"

MR. CUNNINGHAM: "There may be, but I cannot cite it if there is one, and I do not know it."

MR. KOCH: "Can you cite a Supreme Court of Canada decision to that effect?"

MR. CUNNINGHAM: "No, I cannot."

In addition, on cross-examination Mr. Cunningham was repeatedly asked what he meant by "wrongful acts." He consistently evaded the questions, refused to give responsive answers, and refused to define "wrongful acts" (R. 1071).

Mr. Cunningham has been admitted to practice in all courts in Canada and has appeared in all the courts of British Columbia and in the Supreme Court of Canada (R. 1060). Yet he cited no British Columbia or Canadian case applying or even endorsing his theory and then states he knows of none. Has he shown that his theory is the law of British Columbia? The answer is obviously "no." The only case which Mr. Cunningham cited in support of his theory is an English decision which the British Columbia courts are not bound to follow and have never followed (R. 1069). Also, a careful reading of that case will reveal that a conflict of laws

question was not involved, but only a court rule dealing with service of process on non-residents. It is also significant to note that according to Mr. Cunningham this English decision has been referred to in a British Columbia case (R. 1069), yet Mr. Cunningham did not cite this British Columbia case as supporting his view. Only two conclusions can be drawn from his failure to do so: Either the British Columbia case did not refer to the English case on the point in question, in which event Mr. Cunningham has misled the court, or else the British Columbia case rejected or disapproved the theory of the English decision as not stating the law of British Columbia.

At the conclusion of Mr. Cunningham's testimony, Mr. Bird was recalled, and testified that the British Columbia court would not have an option to apply the law of the United States, but it would apply the law of the place where the injury occurred (R. 1075).

However, assuming Mr. Cunningham's theory to be the law of British Columbia, where was the wrongful act committed? Even Mr. Cunningham agreed that if the wrongful act and injury both took place in British Columbia, its court would apply the law of British Columbia (R. 1071). The district court found that there were twelve separate wrongful acts and omissions. Such acts and omissions took place in a number of places, among which were Tokyo, where the passengers were instructed in emergency procedures; Anchorage, where the airplane was inspected and serviced; British Columbia, where the attempted landing was made and the crash occurred; Seattle, where the literature and emergency equipment were put aboard the airplane;

and St. Paul, where engine time and service records were compiled and kept. All of such omissions, except those actually taking place in British Columbia, were of a continuing nature and extended to all jurisdictions through which the airplane travelled. The acts and omissions which were the immediate cause of the accident all took place in British Columbia where the landing was attempted. There is only one place in which it may be said that all acts and omissions took place, and that place is British Columbia. Since the wrongful acts and the injury both occurred in British Columbia, certainly the British Columbia court would apply the British Columbia law.

It should be observed, however, that what the British Columbia court would have done and what law it would have applied are entirely immaterial because this case is not before that court. It would be material only had the district court adopted the English conflict of laws theory of *renvoi* and applied the British Columbia conflicts of laws rule rather than its own rule. Simply stated, *renvoi* means that the foreign conflicts of law rule as well as its substantive law should be applied. According to Professor Beale in his book entitled "A Treatise on the Conflict of Laws," page 56, the English theory has had but limited acceptance in the United States and its use has been severely confined even in England. He then points out that in this country the conflict of laws rules of the forum only are applicable, with the possible exception of cases involving divorce and title to foreign real estate. In tort cases the forum's conflict of laws rule is always applied. This is also the view of the Restatement of Conflict of Laws, Sec. 7.

Professor Stumberg in "Principles of Conflict of Laws," page 11, states: "It seems to be quite generally accepted that 'renvoi' is no part of the American law." Appellant is aware of no federal or Washington cases adopting the *renvoi* theory. The British Columbia conflict of laws rule and Mr. Cunningham's view thereof are immaterial and are of no consequence here. The district court should have found that the law of British Columbia, including the Families' Compensation Act, was applicable to this case and fixed the rights of the parties.

C. APPELLEE'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

In this case the accident and death occurred January 19, 1952. Suit was commenced in the District Court for the Eastern District of Washington January 18, 1954. The pertinent sections of the British Columbia wrongful death statute, the Families' Compensation Act, in force January 19, 1952, were pleaded in affirmative defense XII of appellant's amended answer and proved to the satisfaction of the trial judge (R. 1039). Sections 3 and 5 of the Act provide as follows (Ref. Ex. A-42):

> "Section 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, and notwithstanding the death of the person injured, and although the death shall have been caused un-

der such circumstances as amount in law to an indictable offense."

"Section 5. Not more than one action shall lie for and in respect of the same subject-matter of Complaint; and every such action shall be commenced within 12 calendar months after the death of such deceased person."

If the accident in which Waldrep died occurred in British Columbia as appellant contends, the British Columbia substantive law must be applied. The one-year limitation provision of the Families' Compensation Act is substantive.

The general rule is that the remedy is procedural as distinguished from the right which is substantive, and that the law of the forum applies on matters of procedure. 11 Am. Jur. Sec. 191, page 505. There is a well recognized and universally accepted exception, however, where a statutory liability (wrongful death statute) is sought to be enforced, and that statute prescribes the period of limitation. In that circumstance the general rule adopting the statute of limitations of the forum is departed from, and the limitation prescribed by the statute fixing the liability is applicable. 11 Am. Jur., Sec. 194, page 509: *Central Vermont R. Co. v. White,* 238 U.S. 507, 59 L.Ed. 1433, 35 S.Ct. 865; *Davis v. Mills,* 194 U.S. 451, 48 L.Ed. 1067, 24 S.Ct. 692; *Theroux v. Northern Pac. R. Co.,* 64 Fed. 84 (CCA 8th 1894); *Calvin v. West Coast Power Co.,* 44 F.Supp. 783 (D. C. Ore. 1942); *Negaubauer v. Great Northern Ry. Co.,* 92 Minn. 184, 99 N.W. 620 (1904); 3 Beale, *Conflict of Laws,* Sec. 605.1; *Restatement, Conflict of Laws,* Sec. 397, 603, 605; 68 A.L.R. 210; 146 A.L.R. 1356; 16 Am. Jur. 110, 111.

It is such a wrongful death statute that is before the court in this case. Section 5 of the Families' Compensation Act limits to one year the time within which one entitled to the benefits under the statute may bring suit.

Mr. Bird, the expert witness on British Columbia law called by appellant, testified that Section 5 of the Families' Compensation Act is not procedural but is a part of the British Columbia substantive law (R. 1036). Mr. Bird's testimony on this point was not disputed by appellee's expert on British Columbia law, Mr. Cunningham, nor otherwise refuted.

Apart from the foregoing and as additional authority binding on federal courts sitting in the State of Washington, this state by statute has decreed that a cause of action arising in another jurisdiction and there barred by lapse of time cannot be maintained in this state. R.C.W. 4.16.290, "Foreign statutes of limitation, how applied" provides:

> "When the cause of action has arisen in another state, territory or country between nonresidents of this state, and by the laws of the state, territory or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

The district court should have found that Sec. 5 of the Families' Compensation Act was applicable to this case and that appellee's action was barred because it was not commenced within one year from the date of Waldrep's death.

D. WASHINGTON WRONGFUL DEATH ACT IS NOT A BASIS FOR RECOVERY

The district court found in Finding of Fact 8 (R. 87) that the wrongful death statute of the State of Washington was applicable and granted recovery to plaintiff thereunder. The Washington statute is not applicable and can furnish no basis for recovery in this case for the following reasons:

1. The law of the place of the tort controls.

It is conceded that the injury and death did not occur in the State of Washington. It has already been pointed out that the law of the place of the tort controls, *supra,* pp. 28 to 36. The Washington law is not applicable under the universal conflict of laws principle. It is apparent that the wrongful death statute, if any, of the place where the injury was inflicted governs this action for wrongful death, not the Washington statute.

2. The accident and injury causing death took place either in the waters of the Province of British Columbia or in the adjacent waters of the Dominion of Canada.

Finding of Fact 2 (R. 83) and the court's decision (R. 72) locates the accident and injury below low water mark and outside of British Columbia jurisdiction. Appellant contests this finding because the pleadings, evidence and prior adjudication establish conclusively that the accident and injury did occur in British Columbia. If the accident did not happen in British Columbia, it must have happened in the waters of the Dominion of Canada. Appellee's complaint and all the

evidence establish that the crash occurred "less than a mile off shore in the waters of Hecate Strait, British Columbia" (R. 5). Appellant admits this fact in its answer, and there is no evidence in the record to the contrary. Under the controlling conflict of laws rule, the applicable law is that of British Columbia or the Dominion of Canada.

3. The Washington statute does not have extraterritorial effect.

It is a well-known principle that the statutes of a state have no extraterritorial operation. In 50 Am. Jur. 508, Statutes, Sec. 485, it is stated:

> "It is frequently declared that statutes can have no extraterritorial effect. By this statement it is meant that legislative enactments can only operate, *proprio vigore,* upon persons and things within the territorial jurisdiction of the lawmaking power, and that no law has any effect, of its own force, beyond the territorial limits of the sovereignty from which its authority is derived. Thus, the general rule is that no state or nation can, by its laws, directly affect, bind or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid. A statute may, however, be valid insofar as it relates to persons or things within the jurisdiction and invalid insofar as it relates to persons and things outside the jurisdiction."

Further, it is presumed that a statute is not intended to have extraterritorial effect. 50 Am. Jur. 508, Statutes, Sec. 487.

The Washington Supreme Court has followed and applied these general rules in *Fisch v. Marler,* 1 Wn.2d

698, 707, 97 P.2d 147, and in *Willey v. Willey,* 22 Wash. 115, 60 Pac. 145.

The same rules have been applied to wrongful death statutes, and the decisions of state and federal courts and the text writers furnish overwhelming authority. In 16 Am. Jur. 252, Death, Sec. 388, it is stated:

> "Wrongful death statutes have, in themselves, no extraterritorial effect."

In Section 389 it is stated:

> "It is established by the overwhelming weight of authority that the existence of a right of action for wrongful death must be determined by the law of the place where the fatal injury was inflicted. If that law gives no right of action, no action may be maintained, although the statute of the forum gives such a right."

Herbert Goodrich, in his Handbook of the Conflicts of Laws, 2nd Edition, states at page 251:

> "No action may be brought in one state of injuries resulting in death which were inflicted in another state, unless an action is given by the laws of the state where the injury occurred. It is not enough that there is such a statute at the forum allowing recovery for death by a wrongful act."

The following are but a sampling of the many cases supporting the rules in wrongful death cases:

Calvin v. West Coast Power Co., 44 F.Supp. 783 (Ore. 1942);

Jeffrey v. Whitworth College, 128 F.Supp. 219 (Wash. 1955);

Faron v. Eastern Airlines, 84 N.Y. Supp.2d 568 (1948);

Rose v. Phillips Packing Co., 21 F.Supp. 485 (Md.);

Ross v. Eaton, 6 A.(2d) 762 (N.H.);

Keese v. Atlantic Greyhound Corp., 197 S.E. 522;

Summar v. Besser Mfg. Co., 17 N.W.2d 209 (Mich.);

Baldwin v. Powell, 61 N.E.2d 412 (N.Y.);

Diatel v. Gleason, 22 F.Supp. 335 (N.Y.).

It should be pointed out, however, that one state, Pennsylvania, follows a rule differing slightly from the general rule. The Pennsylvania courts, too, apply the law of the place where the injury occurred, even in cases where negligence is alleged to have occurred within the State of Pennsylvania, except where the injured person returns to the State of Pennsylvania and dies there. In the latter event, the law of Pennsylvania is applied. The early cases of *Derr v. Lehigh Valley R. Co.* (1893) 158 Pa. 365, 27 Atl. 1002, and *Hoodmacher v. Lehigh Valley R. Co.* (1907) 218 Pa. 21, 66 Atl. 975, announce the Pennsylvania exception to the otherwise accepted rule. In both cases the decedent died in Pennsylvania from injuries received in New Jersey caused by negligence taking place in Pennsylvania. In the first hearing of the *Hoodmacher* case, it was assumed that the decedent died in New Jersey instead of Pennsylvania, and under these assumed facts the court held that the New Jersey law must apply. When it was brought out on rehearing that the death

actually occurred in Pennsylvania, the court applied the Pennsylvania law.

Even the Pennsylvania court has regarded its rule as anamolous and undesirable. In the more recent case of *Mike v. Lian* (1936) 322 Pa. 353, 185 Atl. 775, the court applied the Ohio law to an accident resulting in injuries in Ohio, caused by negligence occurring in Pennsylvania. In its opinion, the court stated:

> "Disregarding the broad language which was employed in them (*Hoodmacher* and *Derr* cases), a careful analysis shows that the only actual inconsistency with the rules above enunciated occurs in the decision on the re-argument in the *Hoodmacher* case, where the court, apparently influenced by the fact that this is a death action, seized upon the place of death as determining the applicable law. It should be pointed out, however, that as time brought about a further clarification of the theory underlying the statutory death action, our court has placed more emphasis on the place where the injuries are received than on the place where the death occurred. . . . "

Even under the Pennsylvania rule, which the Pennsylvania court now disapproves, the statutes of either British Columbia or the Dominion of Canada would apply to the instant case. The Washington wrongful death act could not apply because the injuries and death of Waldrep occurred in either British Columbia or the Dominion of Canada.

Extensive research by appellant has revealed only one other situation in which a state's wrongful death act was applied to a death resulting from injuries sustained elsewhere. In a very few old maritime cases a

state death statute has been applied where an injury and resulting death occurred aboard ship on the high seas. These cases all arose prior to the passage of the federal Death on the High Seas Act, 46 USCA 761, which creates a cause of action for wrongful death resulting from injuries sustained on the high seas. These early cases were based upon the principle that the ocean vessel was part of the physical territory of the state of which the owner was a resident. The only statute which could be applied then was that of the state of the owner's residence. *McDonald v. Mallory,* 77 N.Y. 546 (1879); the *E. B. Ward,* 17 Fed. 456 (1883); *Lindstrom v. International Navigation Co.,* 123 Fed. 475 (1903); and *Southern Pacific v. DeValle DeCosta,* 190 Fed. 689 (1911), are cases supporting this view.

Because of the obvious limitations of this fiction, two later cases took a slightly different approach. In both *The Hamilton,* 207 U.S. 298, 52 L.Ed. 264 (1909), and *The James McGee,* 300 Fed. 93 (1924), the wrongful death act applied was again that of the state of which the owner of the offending vessel was a resident. In *The Hamilton,* the court reasoned that each state has the power to govern the liabilities resulting from acts of its citizens whether within or without the state so long as the acts are not committed within the territorial jurisdiction of another state, country, or sovereignty. The *McGee* case also follows this view.

The passage of the Death on the High Seas Act rendered the unique doctrine of these few maritime cases unimportant and obsolete. Because of the Act, resort to the fiction has been abandoned, and since its enact-

ment no such cases have arisen in which recovery was based on a state wrongful death statute.

Regardless of which rationale, if either, was the correct one, the necessary prerequisites to the application of the state death statute were identical under each. In all the cited cases the prerequisites were as follows:

1. The owner of the vessel must have been a citizen of the state whose law was to be applied;
2. The vessel must not have been within the territorial jurisdiction of another sovereignty at the time the fatal injury was inflicted.

It is clear that these cases and the rule which they apply have no similarity to the case now before the Court. The defendant is not a citizen of the State of Washington. The airplane crash occurred within the territorial jurisdiction of another sovereignty, either the Province of British Columbia or the Dominion of Canada. Neither of the requirements is met. Furthermore, the accident did not take place aboard an ocean-going vessel, but rather aboard an airplane to which the maritime law is inappropriate and has never been applied. These maritime cases furnish no basis for applying the Washington wrongful death statute.

E. APPELLEE FAILED TO PLEAD OR PROVE THE FOREIGN LAW

If the accident happened in British Columbia, the British Columbia Families' Compensation Act applies and governs the rights of appellee. If, as the district court found, the accident happened seaward of low water mark, what law gives appellee the right to sue appellant for the death of Waldrep? Appellee has not

pleaded or proved any statute or law other than the wrongful death act of Washington. The accident, however, did not occur in Washington, and the Washington act does not afford appellee a basis for recovery. The truth of the matter is that appellee has simply failed to plead or prove any law existing at the place where the accident happened. It has been pointed out that the law of the place where the accident happened determines whether or not a right of action for wrongful death exists.

If she is claiming under any foreign law, appellee has the duty of pleading and proving that law. This rule is well stated in 41 Am.Jur. 296, under the section entitled "Pleading, Laws of Other Jurisdictions":

> "Where it is not otherwise provided by statute, the courts do not take judicial notice of the laws of foreign states, and where such statutes are material to the controversy and are relied on as a basis of a right of action or as a defense, they must be set forth by the pleader so that the court may judge of their effect. The rule applies as well to the statutes of a foreign country and those of a sister state, neither of which is provable if not pleaded."

Washington has adopted, with stated exceptions, the Uniform Judicial Notice of Foreign Laws Act, Revised Code of Washington, Ch. 5.24. This statute permits the court to take judicial notice of the laws of the sister states. R.C.W. 5.24.010. It does not, however, relieve the party from pleading such laws R.C.W. 5.34.040. The laws of a foreign country or jurisdiction still must be pleaded and proved without aid of judicial notice. R.C.W. 5.24.050.

The rule is again stated in 20 Am. Jur. 182 under the section entitled "Evidence, Foreign Laws":

> "Ordinarily, when a litigant relies upon such foreign laws as the basis for his claim or defense, he must plead and prove such laws."

The Restatement of Conflict of Laws is in accord:

> "Section 621, Proof of Foreign Law.
>
> "Except as stated in section 622, foreign law must be alleged in the pleading and proved by evidence."
>
> "Section 622, Foreign Common Law.
>
> "In the absence of evidence, the common law of another common law state is presumed to be the same as the common law of the forum."
>
> "Section 623, Foreign Statutory Law.
>
> "There is no presumption that the statutory law of another state is the same as that of the forum."

This is also the rule followed in the federal courts. *Harris v. American International Fuel Co.,* 124 F. Supp. 878; *Finne v. KLM,* 11 FRD 336.

Appellee has pleaded no foreign law nor has she attempted to prove any. If the accident happened in British Columbia as appellant contends, *appellee* should have pleaded and proved such laws of British Columbia as she thought gave her a right of action for wrongful death. She failed to do so because she realized that an action based on the British Columbia Families' Compensation Act was barred because not timely commenced. Appellee did not plead or attempt to prove any law of the Dominion of Canada creating a right of action for wrongful death. Her failure in this respect is easily explained by the fact that there is no such law.

This would have been the testimony of Mr. Bird had he been permitted by the court to testify (R. 1038-1039). Having failed to plead or prove any law existing at the place of the accident creating a right of action for wrongful death, appellee's action should have been dismissed and judgment entered for appellant. This was the result reached in *Cuba Railroad v. Crosby,* 222 U.S. 473, 56 L.Ed. 274, which the district court was bound to follow. Having failed to plead or prove any applicable foreign law giving her a cause of action, appellee was not entitled to recover judgment. It was error to award appellee judgment based on inapplicable Washington law.

F. PRESUMPTION AS TO FOREIGN LAW IS NOT BASIS FOR RECOVERY

Having failed to plead or offer proof of controlling foreign law, appellee, at the conclusion of the trial, requested the court to presume that such foreign law was the same as the Washington death statute. By so doing, appellee sought to avoid dismissal of her action because of her failure to plead and prove the controlling foreign law. The district court seems to have adopted this approach, and in this way applied the Washington wrongful death statute even though it has no extra-territorial force and, under controlling conflict of laws rules, cannot be applied to the accident. It was error for the district court to presume the foreign law for the following reasons: Appellee at no time relied on any foreign law as a basis for recovery; appellee should be estopped from now relying on foreign law; appellant proved the applicable British Columbia law; appel-

lant's additional proof of the foreign law existing at the place where the court found the accident happened was erroneously excluded; the district court applied a rule of presumption that has never been adopted by either the federal or Washington courts. These reasons will be taken up in order.

1. Appellee has never relied on any foreign law.

Unless one is relying in some way upon the laws of a foreign country, there is no room for the application of any sort of a presumption as to the laws of that foreign country. In short, the foreign law is not a matter in issue. In paragraph II of her complaint appellee, though alleging that the accident occurred in British Columbia, Canada, stated that the action was brought "pursuant to paragraph 4.20.010 of the Revised Code of the State of Washington . . . " (R. 6). No mention or reference was made to foreign law nor was there any indication that appellee was claiming under foreign law. Accordingly, appellant in paragraph 9 of its answer specifically denied the applicability of the Washington statute pleaded by appellee (R. 28-9). The issue was thus joined. Even when appellant amended its answer and pleaded the British Columbia death statute, appellee denied its applicability and continued to rely solely on the Washington act. Had not appellee pleaded the applicability of the Washington statute, perhaps there would be an inference that appellee was claiming under the foreign law. By pleading the Washington act and claiming under it exclusively, however, she took an unequivocal position from which she never receded until the trial had ended.

As additional proof that appellee was relying on the direct application of a Washington statute and not on any foreign law, appellant directs the court's attention to a memorandum of authorities submitted to the district court by appellee (R. 17). Throughout the portion of this memorandum relating to Count 1 of her complaint, appellee took the position that the Washington statute had extraterritorial effect; that it was not necessary that the accident occur in the State of Washington for the Washington statute to apply. In addition, she cited therein many cases and discussed public policy considerations in support of her view that, because acts of negligence occurred in Washington, the Washington act should be applied. After four pages of such argument, appellee observed in a single short paragraph that the complaint stated a cause of action even though the foreign law was not pleaded. It was clear that appellant did not intend to rely and did not rely on the foreign law.

Appellee maintained this position, when appellant moved to amend its answer to plead the foreign law which appellant considered applicable, upon the ground that both parties had recognized at all times that appellee's rights were based upon the applicability of the Washington wrongful death statute. In an affidavit in opposition to the motion (R. 44), appellee's counsel stated:

> "Plaintiff has relied in preparation of its case upon the pleadings as they exist based upon the proposition that the laws of forum will govern the matters now at issue herein."

Even as late as the last day of trial, appellee main-

tained this position. While examining Mr. Cunningham with reference to the British Columbia law, counsel for appellee stated that appellee was not attempting to prove any law but was instead attempting to show that foreign law did not apply. He stated (R. 1062): "We are not proving any law." At page 1006 he said: "This is strictly in rebuttal. We are not trying to prove any law." Appellee consistently claimed that the Washington act was directly controlling. At no time has she based her claim on a foreign statute. At no time has she claimed that any foreign law was applicable. Instead, she relied at all times on the Washington statute only. From appellee's standpoint, foreign law was not material and a presumption as to the foreign law should not have been a part of her case.

2. Appellee should be estopped from relying on any foreign law or presumption.

As pointed out above, from the time this action was commenced in January, 1954, until April, 1957, at the conclusion of the ten-day trial, appellee steadfastly maintained that her rights were governed exclusively by the Washington death statute. Not until after all of the evidence was presented did appellee claim that foreign law was applicable. It was at that time that she asserted that appellant had not pleaded or proved any applicable foreign law, and that, therefore, the court should presume the applicable foreign law to be the same as the Washington death statute.

The district court then found, contrary to the pleadings, that the accident did not happen in British Columbia. Appellee was allowed to rely on foreign law

at the place the court found the accident to have happened and the court then presumed that such law, if any, was the same as the Washington death statute. The court refused to permit appellant to offer proof of the foreign law actually existing at this new place of the accident, even though for the first time such foreign law became material to the case.

Appellant had a right to and did rely on the pleadings as establishing the place of the accident. The complaint identified the statute under which appellee claimed. The court, by permitting appellee to change her position after all the evidence was in and to rely on foreign law other than that pleaded or proved, has prejudiced, critically, appellant's position. Appellant has been denied all opportunity to prove the unpleaded and unproved foreign law purportedly relied upon by appellee. Appellee should be estopped now from relying on any unpleaded and unproved foreign law and from resorting to any presumption regarding such foreign law.

It was under strikingly similar circumstances that the Court of Appeals, Eighth Circuit, decreed such an estoppel in *Petersen v. Chicago, Great Western Railway Co.,* 138 F.2d 304. The plaintiff in that case sued in Nebraska for personal injuries sustained in Iowa but did not plead the Iowa law or *any foreign law.* The allegations of her petition were based on the theory of the Iowa statute. At the trial she submitted a memorandum setting forth the Iowa statute and decisions. Evidence sufficient to make out a case under the Iowa law was introduced. She proposed instructions framed on the

theory of the Iowa law. Not until all the evidence was in did she change her position and assert that the law of Nebraska should be applied because the Iowa law was not pleaded or proved. In view of her position throughout the action, the court was quick to hold that the plaintiff could not thus change the theory of her case, and she was estopped from doing so. The Iowa law was applied even though not pleaded or proved.

Similar principles of estoppel have been applied in the following cases:

Crocker v. Russell, 133 Ore. 213, 287 Pac. 224;

Minneapolis and St. Louis Railway Co. v. Winters, 242 U.S. 353, 61 L.Ed. 358;

Arkansas Anthracite Co. v. Stokes, 2 F.2d 511.

Appellant, having relied upon appellee's pleadings and conduct as stating her position, was prejudiced when, after all the evidence was in, appellee changed her position as to the law applicable to this case. Because the district court refused to permit appellant to prove such law, appellee should now be estopped from relying upon it or upon any presumption as to its contents.

3. Appellant proved the foreign law (British Columbia).

Appellant proved the law of British Columbia in effect at the time of the accident, January 19, 1952. Hence, there was no justification for a presumption that such law was identical to the Washington wrongful death statute. Mr. Bird testified that the British Columbia legislative body enacted the Families' Compensation Act having full authority to do so (R. 1038).

Duly authenticated copies of Sections 3 and 5 of that Act (Def. Ex. A-42) were admitted into evidence (R. 1033). Section 3 creates a right of action for wrongful death, and Section 5 provides the time within which such an action must be brought. No contention has been made that this statute does not set forth the law of British Columbia. In fact, the district court considered that Sections 3 and 5 set forth the law on the subject and that such law was sufficiently proved (R. 1039). No evidence to the contrary was offered, even by Mr. Cunningham, appellee's expert on British Columbia and Canadian law.

4. Appellant's additional proof of foreign law was erroneously excluded.

No presumption as to the foreign law should have been resorted to because the district court by a series of errors refused to receive proof of the actual controlling foreign law. This case went to trial on the issues as framed by the pleadings, *viz.*: Does the Families' Compensation Act of British Columbia or the wrongful death statute of Washington apply to an accident happening in British Columbia?

At the trial appellee proved no law (R. 1062, 1066). Appellant proved the pertinent sections of the British Columbia Families' Compensation Act (R. 1039) based upon the proposition that the accident happened in British Columbia, as agreed in the pleadings. When appellant attempted, through Mr. Bird, to prove that this was the only British Columbia statute giving a right of action for wrongful death, the court sustained appellee's objection to the proof (R. 1029-31). The testimony

was excluded on the theory that appellant had not alleged that the Families' Compensation Act was the *only* act under which appellee could claim (R. 1029). Appellant did so allege, however, in paragraph IX of its amended answer (R. 46):

> "Defendant specifically denies the applicability of Section 4.20.010 of the Revised Code of Washington and alleges that *the* applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statute, 1948, entitled 'Families' Compensating Act; . . .' " (Emphasis added)

Appellee and the district court misconstrued the allegation, and placed an erroneous interpretation on common everyday words that have well-understood meanings. They emphasized and construed the words "could have been based" as meaning the pleaded statute was only one of several upon which the action could be based. The words "the applicable statute" were completely disregarded. "The" is defined in Webster's Collegiate Dictionary as follows: "A demonstrative word used especially before a noun to particularize its meaning; as, *the* man, that is, a particular man, as distinguished from a man and from the generic man. Its various special uses are: . . . 4. Before a noun which it marks as denoting one unique of its kind;" The allegation is clear, "the (only) applicable statute" is the Families' Compensation Act; appellee's claim could have been based on that statute had she so desired and had she commenced her action within the time provided by the statute. The construction placed on this allegation by the court was incorrect, prejudicial and con-

trary to the rule generally followed, especially in the federal courts, that pleadings should be liberally construed. Rules of Civil Procedure, Rule 8 (f); *U. S. Plywood Corp. v. Hudson Lumber Co.,* 17 FRD 258; *McKenzie v. Beidberg Rothchild Co.,* 12 FRD 392; *Consolidated Elec. v. Employers Mutual Ins. Co.,* 106 F.Supp. 322. The proof offered by appellant that there was no other applicable law giving a right of action for wrongful death was precisely within the allegations of its answer, and it was error to keep it out. Proof that there was no foreign law under which appellee could successfully claim was thus excluded.

Under the court's ruling, appellant was not allowed to ask whether the British Columbia court *would* apply the Families' Compensation Act were this case before it (R. 1030). Yet appellee in rebuttal was allowed to ask his expert, Mr. Cunningham, precisely the same thing in a long hypothetical question (R. 1061). The witness was allowed to answer even though the hypothetical question was not qualified by stating that the accident happened in British Columbia (R. 1065). During the cross-examination of Mr. Cunningham, appellant was again kept from asking if the act "would" apply (R. 1067). The conduct of the court in refusing to appellant the same opportunity to offer evidence as that given to appellee was both prejudicial and unjust. In addition, the court erred in allowing Mr. Cunningham to answer the improperly qualified hypothetical question.

In a further attempt to show that the Families' Compensation Act was the only applicable law, appellant

offered proof that only the legislature of British Columbia could deal in this field of property and civil rights even to the exclusion of the Dominion of Canada (R. 1037). The court misunderstood the inquiry, took over the questioning from counsel, and asked whether the British Columbia legislature had authority to enact the Families' Compensation Act—a fact which had never been in dispute (R. 1038). The court then sustained objections to further inquiry into the matter (R. 1039), and thereby once more prevented proof of the controlling foreign law.

Appellant further attempted to show that there was no applicable law of the Dominion of Canada, providing a right of action for wrongful death (R. 1037). The court again prevented the proof from coming in.

After keeping out all of this proof as to British Columbia and Canadian law, the district court decided the case on an entirely different theory from that upon which the case was pleaded and tried. Contrary to the pleadings, evidence, and prior adjudication of the Supreme Court of Washington, the court placed the accident *outside* of British Columbia, stated that the law outside of British Columbia had not been proved, and by presumption applied the Washington statute. After preventing appellant from proving the Canadian law, the district court found that such law was applicable and, because not proved, that *appellant* must suffer the consequences. The position taken by the district court was extremely unfair, especially in view of its statement made during the examination of Mr. Bird. The court said " . . . and it is not necessary to go into all this

long detail about what all the Canadian law provides'' (R. 1038).

The court had an opportunity to correct this injustice when appellant, after the oral decision and again after judgment was entered, moved to amend its answer to set forth the law of Canada which would be applicable at the new place of the accident (R. 58, 106). Appellant also moved to reopen so that further testimony as to that law could be presented (R. 58, 106). But the court, having already made up its mind, summarily denied the motions, as well as the motion for a new trial (R. 106), and the travesty was complete.

Had any one of these errors not been made, a different result would have been reached, preventing recovery by appellee. Had the court found the accident happened in British Columbia as the pleadings, evidence, and prior adjudication required, the Families' Compensation Act would have barred recovery by appellee. Had the court not misconstrued appellant's pleadings, appellant would have shown the Families' Compensation Act to be the only applicable statute under which appellee could have claimed. The same result would have followed had the court construed appellant's pleading liberally, in accordance with the Rules of Civil Procedure and cases decided thereunder. Had the court permitted appellant to show that no statute of the Dominion of Canada created a right of action under which appellee could claim, regardless of where the accident happened, appellee could not have recovered. Had the court permitted appellant to ask Mr. Bird the same question appellee was allowed to ask Mr. Cunningham, the Families' Compensation Act would have been shown to be the only applicable law. Had the court not

taken over from counsel the interrogation of Mr. Bird, and had it allowed appellant to pursue the interrogation, it would have been shown that the Dominion of Canada could not deal in the field of property and civil rights at the place of the accident. Had the court granted appellant's motion to amend and reopen, appellant would have proved that there was no law of Canada creating a right of action upon which appellee could base her claim.

All of these errors were prejudicial. Had any one of them not been made, proof of the applicable foreign law would have been introduced, thereby rendering resort to a presumption as to that foreign law unnecessary and inappropriate. Because of these errors, it was improper for the court to use the presumption and apply the Washington law.

5. The court erroneously applied the wrong foreign law presumption.

The general rule is that there is no presumption as to foreign statutory law. Section 623 of the Restatement of Conflict of Laws sets forth the general rule as follows:

> "There is no presumption that the statutory law of another state is the same as that of the forum."

It is only the common law of another common law jurisdiction, not its statutes, that can be presumed to be the same as the common law of the forum. Restatement of Conflict of Laws, Sec. 622. This is the federal rule and was laid down in the leading case of *Cuba Railroad v. Crosby, supra.* This presumption has been applied by both state and federal courts concerning the

common law of a foreign country as well as the common law of a sister state where the foreign jurisdiction's system of law is based on and derived from the common law. *Kingwell v. Hart,* 45 Wn.2d 401, 275 P.2d 431; *Cuba Railroad v. Crosby, supra.* Ordinarily a court will take judicial notice of the fact that a country's law is derived from the common law. *Cuba Railroad v. Crosby, supra.* It is not at all clear that such judicial notice may be taken of the laws of Canada, as its laws are based upon both the English common law and the French civil law. Nevertheless, such a presumption would not benefit appellee because the right of action for wrongful death that she asserts was, and is, unknown to the common law. *Whittlesey v. Seattle,* 94 Wash. 645, 163 Pac. 193; 16 Am. Jur. 35. The district court was bound to follow the federal rule, and had it done so, judgment would have been entered in favor of appellant because of appellee's failure to prove the applicable foreign law. Instead, the district court allowed appellee to recover, stating in finding of fact 8 (R. 87-8): "No other applicable law having been adequately pleaded or proven, the law to be applied by this court to count 1 of plaintiff's complaint is the law of the State of Washington relative thereto." The federal rule was thus by-passed and, although applicable, was not invoked.

The district court's holding cannot be justified as an application of the rule laid down in the Washington cases either. It goes far beyond the liberal rule of presumption adopted by the Supreme Court of Washington. The Washington court has presumed that the provisions of a foreign statute, *shown to exist* but not

proved, were the same as the Washington statute on the same subject. Representative of such cases are *Gasaway v. Thomas,* 56 Wash. 77, 105 Pac. 168, and *Fletcher v. Murray Commercial Company,* 72 Wash. 525, 130 Pac. 1140. Ignoring the federal rule, appellee sought to extend and apply the Washington presumption rule, and the district court went along. In so doing appellant persuaded the court to indulge in three separate presumptions. First, a presumption that the laws of the foreign country are derived from the common law; in fact, the laws of Canada are derived from the civil law as well as the common law. Second, a presumption that the foreign country has deviated from the common law and has enacted a statute creating a right of action for wrongful death; in fact, no statute has been enacted by Canada that could furnish a basis for appellee's action (R. 60-72). Third, a presumption, even in the absence of proof that such a statute exists, that the provisions of such a statute are identical with those of the Washington statute; in fact, there was no statute similar to the Washington statute under which appellee could have claimed (R. 60-72). The Washington court has never gone this far.

By piling presumption upon presumption in this manner, an inflexible fiction is creation which departs from and ignores the probabilities concerning the foreign law as it actually exists. As stated in 30 Mich. Law Review at page 760:

> "Certainly the rule attains simplicity, but it seems to have done so at the expense of fairness. Moreover, it is difficult to support on the ground of reasonableness, for what logic can there be in sup-

posing that legislatures in various states and nations have enacted concordantly?"

Reduced to its simplest terms the district court has ruled that in the absence of proof of the foreign law that is controlling, the law of the forum will be applied even though in fact it has no application. This view of the rule has been severely criticized by Albert Kales, Professor, Northwestern University Law School, in 19 Harvard Law Review, at page 412 where he states:

> "This second view seems not to rest upon any particular rational inference from the facts of which the court takes judicial notice. There is certainly nothing to warrant the court in saying there is any possibility that the law of a sister common law state is like the statutory law of the forum. How much less, then, is there any rational ground for supposing that the law of a foreign state, like Mexico or Chile, is like the statutory law of the forum of one of the states of the United States having a common law system of jurisprudence? The second view seems to rest upon the necessity of having a general rule so simple and unqualified that it may always be know who has the burden of going forward with the proof of the foreign law. From the point of certainty it may be admitted that it is a good rule. It is submitted, however, that it throws an unjust burden upon the one who has not naturally the burden of going forward with the evidence."

To appellant's knowledge, the Washington court has never departed so far from the general rule as to indulge in the three-step presumption when the existence of a foreign statute under which recovery could be based is not known and, in fact, does not exist. *Young*

v. Industrial Chemical Co., 2 WWR 468 (R. 61); Canada Shipping Act, Chapter 35, Statutes of Canada 1948 (R. 62-66); Admiralty Act, Chapter 31, Statutes of Canada, 1934 (R. 66-69). Mr. Bird testified concerning the admiralty court's jurisdiction and stated that it does not have jurisdiction over wrongful death actions involving aircraft, unless the death resulted from a collision between an aircraft and a vessel (R. 1040). He further stated, however, that if it did have jurisdiction, it could apply the Families' Compensation Act (R. 1041). *Le Val v. S. S. Giovanni Amendola, supra.* The Washington court has not presumed in any case that a right of action unknown to the common law exists in a foreign country and that the terms of a statute creating such a right are identical to a Washington statute. There is no Washington decision presuming the enactment by another jurisdiction of a wrongful death statute.

G. THE AMOUNT OF DAMAGES AWARDED WAS EXCESSIVE

Inasmuch as the district court granted recovery under the Washington wrongful death act, justification for the extremely high damage award must be found in the Washington law. The measure of damages in a wrongful death case is well stated in *Kramer v. Portland-Seattle Auto Freight,* 43 Wn.2d 386, 261 P.2d 692, as follows:

> "It is fundamental, in cases such as this, that the measure of damages is the pecuniary loss sustained by the beneficiaries for whose benefit the action is prosecuted."

Punitive or exemplary damages are not recoverable

for wrongful death in Washington and cannot be a part of the damage award. *Longfellow v. Seattle,* 76 Wash. 509, 136 Pac. 855.

Appellant realizes that the amount of any award depends largely on the facts of the particular case. Nevertheless, decided cases do indicate generally what is reasonable and what is excessive. In *Hinton v. Carmody,* 182 Wash. 123, 45 P.2d 32, an award of $5,000 to an infant child for the death of his 21 year old mother was held to be reasonable. In *Pearson v. Picht,* 184 Wash. 607, 52 P.2d 314, a damage award of $1,500 to the widow of a 27 year old husband was found inadequate, and the appellant court increased the judgment to $11,500. In *Cook v. Murphy,* 200 Wash. 234, 93 P.2d 376, an award of $1,000 to the parent of a 21 year old girl earning ninety dollars a month was held to be reasonable.

A review of the evidence in this case will demonstrate that the award made by the district court was unreasonable and excessive. Finding of Fact No. 10 and what should be Finding of Fact No. 11, though unmarked (R. 88-90), are not supported by the evidence and are erroneous. There is no evidence that Waldrep ever intended to complete his schooling. On the contrary, the testimony of Leroy Waldrep, his father, clearly shows that he had no intention of completing his schooling. This witness stated that the highest grade his son completed was the ninth grade (R. 1100) and that thereafter he joined the Merchant Marine at the age of sixteen (R. 1083). After two years in the Merchant Marine Waldrep returned to his home in Alabama for a period of approximately six

months during which he worked for his father as a farm hand and was paid between fifteen and twenty dollars per week (R. 1085, 1086). He then joined the United States Marine Corps and served for two and one-half years at a pay ranging from ninety to one hundred dollars per month. He again returned home and stayed there for a period of six to eight months, attending night high school and working as an auto mechanic during the day. At this job his pay varied from twenty-five to thirty dollars per week (R. 1090, 1101, 1102). After this brief period at home, he again entered the military service in the fall of 1949. This time he selected the United States Army, enlisting for a four-year hitch (R. 1091, 1092). During this enlistment he met his death. It is a distortion of these facts to find that Waldrep had any intention whatsoever of completing his schooling. On the contrary, it appears that Waldrep, after completing the ninth grade, quit school on two separate occasions to enter services of the United States for periods totalling eight and one-half years. There is no evidence to support this finding of the court.

Likewise, there is no evidence to support the findings that Waldrep attained the rank of sergeant first class, pay grade "E-6," or that his total pay and allowances exceeded three hundred dollars per month. Waldrep's father testified that as far as he knew Waldrep was a buck sergeant, but that he thought his son had a promotion coming up (R. 1103, 1104). He further stated that he did not know the amount of his son's monthly pay. Mrs. Bloth, Waldrep's sister-in-law, testified that Waldrep had attained the rank of sergeant first class (R. 431), but was not asked how she knew this fact or

whether or not she was testifying from personal knowledge. She did not testify how she obtained this information. She admitted on cross examination that at the time of Waldrep's marriage—less than one year before his death—he was a corporal (R. 401, 474). The only other evidence on the point is contained in the Air Passenger Manifest (Def. Ex. A-20) for Flight 324 upon which Waldrep met his death. There Waldrep is listed only as "SGT" while those passengers who had attained the rank of sergeant first class were designated as "SFC." Richard P. Field, one of the survivors, testified by deposition at the trial. He testified that he was a sergeant first class (R. 1153). On the Air Pasenger Manifest he is so listed by the abbreviation "SFC." The evidence, then, on this issue is this: Waldrep's father testified that the deceased was a buck sergeant; the Air Pasenger Manifest, prepared by the U. S. Government and delivered to appellant on January 17, 1952, at the time Flight 324 departed from Tokyo, listed him as a sergeant only and not as a sergeant first class. Mrs. Bloth stated, on the other hand, that he was a sergeant first class. Mrs. Bloth did not testify that this information came from Waldrep, and the strong probabilities are that it did not (R. 474). If it came from other sources, such testimony would be hearsay and not entitled to consideration. Certainly little, if any, weight can be attached to it. The court's finding is not supported by any substantial evidence, and the evidence preponderates against such finding. The credible and preponderating evidence is that Waldrep was a buck sergeant.

It was stipulated between counsel during the trial that a sergeant first class has a pay grade "E-6," and a

buck sergeant a pay grade "E-4" (R. 662). At the time of Waldrep's death he was receiving pay and allowances as prescribed by the Career Compensation Act of 1949, Chapter 681, 63 Stat. 802. According to said statute Waldrep, with over four but under six years of accumulative service in the uniformed services of the United States was entitled, if a buck sergeant (pay grade E-4), to receive each month a base pay of $132.30, foreign duty pay of $13.00, and a quarters allowance for his dependents of $45. If he was a buck sergeant (pay grade E-4) then his total monthly pay amounted to $190.30.

If Waldrep was a sergeant first class (pay grade "E-6"), he would have been receiving a base pay of $176.40, foreign duty pay of $20.00, and an allowance for quarters of $67.50, a total of $263.90 per month. The court's finding that Waldrep was receiving in excess of $300.00 each month is clearly erroneous, regardless of the pay grade attained, is totally unsupported by any evidence and is contrary to the Career Compensation Act of 1949, Chapter 681, 63 Stat. 802, *supra,* then in effect.

The District Court's finding that it was likely that Waldrep would be "in the future amply able to provide suitable, expensive, and valuable support, care and education for his minor daughter . . ." (R. 89) is likewise unsupported by any evidence. There is no evidence that he was other than a normal, healthy man, apparntly making a career in the military service of the United States. The court should have found that Waldrep was likely to have provided in the future such

support, care, and education for his minor daughter as his military income would have permitted.

The record likewise does not support the court's sentimental finding that the child is intelligent, has bright prospects for future accomplishment, and is gifted (R. 89). Mrs. Bloth admitted on cross examination that there was no objective basis for her testimony on direct examination that Judith Ann had any special musical or artistic talent (R. 474-476). Mrs. Bloth also acknowledged that she herself did not sing or play a musical instrument (R. 474). She revealed no training or educational background entitling her to express an opinion with respect to the ability and capacity of this child. Mrs. Bloth admitted that she based her judgment of the child's musical talent on her own observation of the child only (R. 475) and not by a comparison of the child with other children of similar age. Although Mrs. Bloth testified that Judith Ann had more than average mentality (R. 440), again this was based on her, Mrs. Bloth's, personal and inexpert opinion, not on an intelligence test or upon the judgment of persons skilled in the testing and measurement of intellectual capacity (R. 477).

There was absolutely no evidence from which even an inference could be drawn that Waldrep could have provided the sums of money necessary to support the child in the extravagant fashion Mrs. Bloth, her aunt, would now like to provide for her at appellant's expense. Insofar as the child is entitled to recovery for the money support that she lost because of her father's death, her damage can be measured only by the amount that Waldrep reasonably could have contributed for

her support, and not by the amount that someone else thinks that desirable things in addition to support will cost. It is solely a matter of how much Waldrep could reasonably have been expected to contribute, whether this is much or little. The evidence shows that Waldrep had made an allotment to his wife of $70 per month (R. 431) and also sent her some additional money (R. 432). The testimony of Mrs. Bloth relating to how much it would cost her to take care of Judith Ann and to give her the same things she gives to her own children should not have come into evidence or have been considered by the court in awarding damages. It should be observed that Mrs. Bloth's testimony was both vague and speculative. The district court recognized that her cost of support estimates were her own opinion only and not binding on the court (R. 426, 427). She testified that she estimated it would cost one hundred dollars each month to give Judith Ann the things that her own children received, until Judith Ann reached the age of six and one-half years and started to school. Mrs. Bloth estimated that during the grammar school years the cost of supporting Judith Ann would be increased 50 per cent to $150.00 per month. Mrs. Bloth testified that at the high school level (R. 427) it will require $200.00 per month to support Judith Ann (R. 428). When, on cross-examination, Mrs. Bloth was asked to substantiate these estimates, she was unable to do so (R. 443-450). She could not satisfactorily explain the increase in the monthly amounts needed when the child enters grammar school and high school. To account for the fifty dollar per month increase when the child enters grammar school, Mrs. Bloth stated only

a need for more clothing and for transportation to school (R. 460). To justify the second fifty dollar per month increase upon entering high school, Mrs. Bloth, although conceding that the cost of transportation to school would be reduced (R. 463), cited the need for still more clothing, transportation to sports events up to 400 miles away (R. 462), and such luxuries as thirty-five dollar cheerleading sweaters and several twenty-five dollar cheerleading outfits (R. 463). Mrs. Bloth's testimony in this regard is vague, speculative, fanciful, and entitled to little or no weight.

There was other testimony of Mrs. Bloth, however, that was considerably more revealing as to the amounts actually required. On cross-examination she was asked to estimate the basic costs incurred since October, 1956, when she, her husband, their five- and sixteen-year-old girls, their two grandparents and Judith Ann were all living together in Mrs. Bloth's home. She estimated that it cost each month $225.00 for food, $75.00 for utilities, $111.00 for house payment, $25.00 for medical expenses, and $60.00 for clothing, a total of $496.00 each month (R. 448, 449, 450). If this amount were divided by the seven people living in the house and receiving the benefit of this monthly expenditure, the amount expended per person would be about $71.00 per month. This testimony of Mrs. Bloth is more reliable because it is based upon her own actual monthly outlay to maintain the home and care for those living in the home. This sum for the monthly support of Judith is an amount which the deceased, had he lived, reasonably could have been expected to provide.

To illustrate that the damage award of $40,000.00 is excessive in this case, it must be translated into a monthly income for Judith Ann. Using the standard 4 per cent discount table, $40,000.00 would provide Judith Ann with an income of $230.00 per month for twenty-one years. This is far more than Sgt. Waldrep reasonably would have been able to provide for his daughter had he lived and more than three times the allotment he had been making to his wife. It even exceeds by $30.00 per month Mrs. Bloth's rash guess of the cost of providing Judith Ann during the high school years with support plus luxuries. Mrs. Bloth also estimated $100.00 per month to age 7 and $150.00 to age 14 for Judith Ann.

Seventy-one dollars per month is Judith Ann's share of the actual cost of supporting the seven members of the Bloth household. Annually the cost of her support amounts to $852.00. According to the 4 per cent discount table, it would require a lump sum award of $12,430.70 to provide an income of $71.00 for twenty-one years. This is a far more realistic figure in view of the decedent's earnings.

In *Gulf and S.I.R. Co. v. Boone,* 120 Miss. 633, 82 So. 335 (1919) the court reduced a verdict of $30,000.00 for the wrongful death of a soldier, 21 years of age, to $20,000.00 on the ground that the verdict was excessive. In *Thompson v. Seattle,* 42 Wn.2d 53, 253 P.2d 625, the award for the wrongful death of a married man to his surviving widow, three minor children and an unborn child totaled $39,191.75. The award was segregated among the beneficiaries. The sum allocated to the unborn child was $5,805.00.

From this view of the evidence, an award of $40,000.00, even though it includes damages for loss of parental care and guidance, is manifestly excessive. Instead of fair compensation for pecuniary loss sustained, the damage award in this case is in the nature of a penalty.

H. COST OF UNNECESSARY PORTION OF TRANSCRIPT AND RECORD SHOULD BE TAXED AGAINST APPELLEE

If appellant is successful in this appeal, costs in this court and the district could should be taxed against appellee. Regardless of the outcome of this appeal, however, part of the cost of the district court reporter's typewritten transcript and of the printed record in this court should be taxed against appellee. Although requested to do so by appellant (R. 119-121), appellee refused to stipulate that the testimony of certain witnesses was unnecessary and unessential to the issues on appeal. Appellant was thereby required to produce such testimony in full. Appellant offered to stipulate that the testimony of witnesses Peterson, Pitcher, Opsahl, Smith, Lewis, Kavanaugh, Hewitt, Thompson, Whittle, and Kingston was not material to the issues on appeal and need not be included in the transcript or printed record (R. 125-126). Appellee, although so stipulating as to other witnesses (R. 112) refused to stipulate as to these witnesses (R. 122) and required that their testimony be included. The testimony of these witnesses in no way bears upon the issues before the court on this appeal. Their testimony related solely to the issue of negligence. Appellant has not appealed

from the district court's findings with respect to that issue, rendering such testimony unnecessary and unessential to this appeal. Under Rule 75e of Federal Rules of Civil Procedure and Rule 17(6) of Rules of the Court of Appeals, Ninth Circuit, the cost of including such testimony should be taxed against appellee. *Associated Indemnity Corp. v. Manning* (CCA-9) 107 F.2d 362; *U.S. v. Vanegas* (CCA-9) 216 F.2d 657; *Watson v. Button* (CCA-9) 235 F.2d 235; *In re Joshua Hendy,* 2FRD 244; *Washington Coca-Cola v. Tawney,* 233 F.2d 353.

Testimony of these witnesses consumed 282 pages of the 1,095-page transcript, the total cost of which was $932.50. The proportionate cost of transcribing the testimony of these witnesses is $240.15.

Such testimony consumed 245 pages of the 1,165-page printed record, the total cost of which was $3,-155.16. The proportionate cost of printing the testimony of the witnesses is $663.53. Accordingly, regardless of the outcome of this appeal, costs of at least $903.68 should be taxed against appellee.

VI.
CONCLUSION

Appellee brought this negligence action against appellant claiming damages for the death of John M. Waldrep. At common law no such right of action existed; therefore it is only under a statute creating such a right of action that appellee's claim can be sustained. In her complaint, appellee pleaded the Washington wrongful death act, and she has claimed throughout

under the Washington act only. The accident in which Waldrep met his death did not occur in the State of Washington, however. The Washington wrongful death act has no extraterritorial force and cannot be applied where the injury resulting in death was inflicted in another jurisdiction. No cause of action arose under the Washington act, and appellee has no claim under it.

It was flagrant error for the district court to deny appellant judgment under its twelfth affirmative defense. The district court based its denial of the affirmative defense upon the crucial finding of fact that the accident happened more than "a half mile out seaward from low water mark" and therefore not within British Columbia jurisdiction.

Appellee alleged in her complaint and appellant admitted in its answer that the accident happened in British Columbia. This was the basis upon which the case was prepared. This was the basis upon which the case was tried. It was an agreed fact in the case. No proof to the contrary was offered by either party, and any such proof would have been inappropriate.

Furthermore, the fact that the accident happened in British Columbia had been previously established by the Supreme Court of Washington in a prior case between the same parties concerning the same accident. The parties were foreclosed from relitigating that fact.

This finding was erroneous because it is completely unsupported by and is contrary to all the evidence on the point. Both Mr. Bird and Mr. Cunningham, the British Columbia lawyers, agreed that the coastal boundaries of British Columbia extend at least to low

water mark, making the area between shore and low water mark a part of the Province of British Columbia. The only evidence placing the accident with reference to low water mark was the testimony of Mr. Leonard and Mr. Kildahl. Mr. Leonard, who investigated the accident in January, 1952, and again in June, 1952, testified that in January, 1952, he observed the efforts made to tow the aircraft; that the total amount of movement in all directions was not more than one hundred feet; and that at the conclusion of the towing the aircraft was no nearer shore than before. Mr. Leonard testified further that on June 9, 1952, he walked out to the airplane; that it was substantially buried in the sand; that it appeared to be in exactly the same position it had been in January on the day after the accident; that it was completely out of the water at low tide; and that the tidal edge of the water at low tide was at least seventy-five feet seaward of the airplane.

Mr. Kildahl, the maritime navigation expert, then testified that on the occasion of June 9, 1952, when Mr. Leonard walked out to the airplane, the low tide was 1.1 feet above zero tide and that zero tide is low water mark. In other words, low water mark was yet some distance seaward of the tidal edge of the water on that occasion. The combined testimony of Mr. Leonard and Mr. Kildahl established, in the absence of evidence to the contrary, that the aircraft came to rest landward of low water mark and within the territory of British Columbia. There was no evidence to the contrary. No other testimony was presented to the court placing the accident with reference to low water mark. Wit-

nesses Maynard, Baker, Field, Cox, and Sanders placed the aircraft anywhere from one-half to one mile from shore. The testimony of these witnesses was in no way related by their own or any other testimony to low water mark. The district court could have found from the evidence that the accident occurred at a given distance from shore, perhaps, but such finding could not justify finding No. 2 that the accident happened more than one-half mile seaward from low water mark. The district court's finding is totally unsupported by any evidence. The indicated finding from the evidence should have been: that the accident happened *landward* of low water mark in the Province of British Columbia.

Under the well-established and controlling conflict of laws rule following in this country, the law of the place of the tort should be applied in a wrongful death action. The tort is deemed to have been committed at the place where the injury causing death is inflicted. Under the admitted facts of this case the British Columbia law would control the rights of the parties.

The only British Columbia statute creating a right of action for wrongful death is the Families' Compensation Act. That Act contains a time limitation of one year within which an action must be brought. This provision is substantive and must govern no matter where the action is commenced. Because it was not commenced within one year from the date of Waldrep's death, appellee's action was barred. The court should have ruled: that the British Columbia Families' Compensation Act is applicable and governs the rights of the parties hereto; that appellee failed to commence its action within

the time limit set forth in Sec. 5 of the British Columbia Families' Compensation Act, which is a bar to her cause of action.

The Washington wrongful death act is not a basis for recovery by appellee. The law of the place of the tort controls, and it is undisputed that this place was not in Washington. The accident and tort took place either in British Columbia as appellant contends, or Canada, as the district court found. The Washington act cannot apply in this case because it has no extra-territorial effect and cannot apply to a death caused by injuries inflicted outside the State of Washington.

Appellee did not plead or prove any foreign law; furthermore, she did not rely on the foreign law. It follows then that this is not a proper case for the application of any presumption regarding the foreign law. From the beginning appellee has relied entirely on the Washington death act which she alleged in her complaint. Having relied on and having claimed under no foreign law as the basis for her wrongful death action, she has not made either the existence or content of the foreign law an issue in her case. Accordingly, there is no room for the application of any presumption relating to that foreign law. Appellee should be estopped from claiming under a foreign law by way of a presumption as to its contents. She is attempting to take a position inconsistent with her previous assertion of rights under the Washington law, upon which assertion appellant has justifiably relied.

Appellant on the other hand in its affirmative defense XII pleaded, as a bar only, the law applicable at

the place where appellee alleged the accident had occurred. No presumption is applicable to the foreign (British Columbia) law pleaded by appellant in defense because such law was actually proved by appellant.

Under the federal rule presumptions relating to the law of a foreign country encompass only the common laws of foreign countries the jurisprudence of which is based upon the common law. There is no presumption that a statute of a foreign country is identical to the statute of the forum. The Washington court, however, has departed somewhat from this rule and has on occasion presumed that a foreign statute is the same as a Washington statute on the subject. Appellee seeks to extend the presumption to include more than just the terms and provisions of a known foreign statute. Appellee also wants the court to presume that a statute on the subject has been enacted by a foreign country and is in force. Appellant is aware of no Washington decision that has gone that far. The federal rule is binding on the district court, and it was error for the court to have permitted appellee to recover on the premise that the Washington death statute applied, "no other applicable law having been pleaded or proved."

The district court erroneously refused to allow appellant to introduce evidence which, if admitted, would have rebutted any such presumption. Appellant, in support of its affirmative defense based upon the British Columbia statute of limitations contained in the British Columbia Families' Compensation Act, sought to show through Mr. Bird that there was no other

statute under which appellee could claim. Appellant was within its pleading in seeking to introduce such testimony. Had it come in, it would have established that there was no statute other than the Families' Compensation Act, in either British Columbia or the Dominion of Canada, creating a right of action for wrongful death under which appellee could claim. The exclusion of such testimony was error; its admission would have destroyed any such presumption. Furthermore, after the district court rendered its decision and found that the accident did not happen in British Columbia, appellant sought permission to amend its affirmative defense to plead the non-existence of any applicable wrongful death act in the jurisdiction in which the court found the accident did happen and to submit proof thereof. Again, the presumption would have been eliminated if appellant had been permitted to introduce such proof. Because the court's finding changed the place of the accident from that agreed upon in the pleadings and from that fixed by prior adjudication, it was an abuse of discretion to deny the amendment and proof.

The damage award to appellee was unreasonably high and excessive. The $40,000.00 awarded would provide a monthly income for the next 21 years far in excess of the amount Waldrep, a soldier, could reasonably have been expected to provide. In fact the award will yield a monthly revenue for 21 years of $230, which is in excess of Waldrep's military income including base pay, foreign duty pay and quarters allowance. Such an income would also be far in excess of the monthly amount

actually spent for the care of the child since her birth, and far in excess of Mrs. Bloth's indulgent estimate of the cost of the child's support.

The district court should have found, and should now be directed to find, that the accident happened in British Columbia; that the British Columbia Families' Compensation Act applied; that appellee's action was barred because not commenced within the time provided for therein; and that appellee failed to plead or prove any applicable law under which a wrongful death action could be maintained. The court should have concluded, and should now be directed to conclude, that the Washington wrongful death act was not applicable and that appellee failed to state a claim under Count 1 of its complaint under which relief can be granted. Judgment of dismissal of plaintiff's complaint should have been, and should now be, entered, and costs in both courts taxed against appellee.

Regardless of the outcome of this appeal, however, appellee should be taxed with the cost of producing the unnecessary portions of the transcript and printed record which appellant sought to exclude by stipulation.

Respectfully submitted,

KARR, TUTTLE & CAMPBELL,
CARL G. KOCH,
COLEMAN P. HALL,
Attorneys for Appellant.

APPENDIX

Plaintiff's Exhibits

Pl. Ex.	*Identified*	*Offered*	*Admitted*	*Rejected*
1	519–520	519		521–523
6	501	500	504	
7	679	679	679	
8	679	679	679	
9	682	682	682	
12	241	243	243	
13	257	257	257	
14	347	347	367	
15	384	386	386	
16	399	401	404	
17	406	406	406	
18	407	407	408	
19	408	408		409 (rejected) (withdrawn)
20	435	435	436	
21	543, 621	621	621	
22	542	543–544	544	
23	543, 582	582	584	
24	548–549	549	549	
25	550	579	579	
26	559	561		561 (rejected) 791 (withdrawn)
27	580–581	585	588	
28	625–626	627		791 (withdrawn)
29	630-631	633	637	
30	638	638	639	
31	656, 658	659	659	
32	660	660		683 (withdrawn)
33	658, 660–661	661	661	
34	674–675	675, 681		682
35	676	681	681	
36	680	680	681	
37	798	799		800
38	800	801	802	
39	1001–1002			1002 (withdrawn)

Defendant's Exhibits

Def. Ex.	*Identified*	*Offered*	*Admitted*	*Rejected*
A-3	593	593	593	
A-5	503-504	503	504	
A-15	302	303	303	
A-16	221	221	221	
A-17	263	264	1014	
A-18	538	539	539	
A-19	700	700	701	
A-20	703	704	704	
A-21	703	704	704	
A-22	708	708	708	
A-23	754	756	757	
A-24	766	766	766	
A-25	768–771	769	771	
A-26	771–772	772	772	
A-27	775	775		776
A-28	773	773		774
A-29	777–779	779	779	
A-30	778–779	779	779	
A-31	862–863	863	863	
A-32	865	866	866	
A-33	866	866	866	
A-34	866	867	867	
A-35	905–906	907	907	
A-36	872–873			878 (withdrawn)
A-37	873–887	881		888-889
A-38	873–887	881		888–889
A-39	873–887	881		888–889
A-40	873–887	881		888–889
A-41	1016	1016–1018	1045	
A-42	1026	1031	1033	
A-43	1055	1055	1057	
A-44	1052	1052		1059